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IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., *Petitioners*,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., *Respondents*.

[Additional Case Captions Listed on Inside Front Cover]

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* SCHOLARS OF THE WELFARE OF WOMEN, CHILDREN, AND UNDERPRIVILEGED POPULATIONS IN SUPPORT OF RESPONDENTS

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VALERIA TANCO, ET AL.,

Petitioners,

v.

BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.,

Respondents.

APRIL DEBOER, ET AL.,

Petitioners,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.,

Respondents.

GREGORY BOURKE, ET AL.,

Petitioners,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.,

Respondents.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to redefine marriage and issue marriage licenses to two people of the same sex, contrary to the express, recently reaffirmed vote of the people of the state?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex performed out of state, when doing so is contrary to the state's own fundamental policy decision?

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INTEREST OF AMICI CURIAE[1]

Amici are scholars of the effects that marriage law has on the welfare of women, children, and underprivileged populations. They teach and/or write in a variety of disciplines, but all have, through their research, come to the same conclusion, expressed in this brief, that redefining the institution of marriage away from its roots in the biological complementarity of men and women will have profound negative consequences on society in general and specifically on women and children, particularly those who are socioeconomically underprivileged.

Camille S. Williams has researched, taught and published articles about a variety of family law issues, including research on the disparate impact some laws have on women and children. As one of the authors whose scholarship is relied upon in this brief, she is familiar with the literature about the benefits sex-integrated marriage provides women and children.

Dr. Janice Chik Breidenbach is an Assistant Professor of Philosophy at Ave Maria University.[2] Her scholarship has focused on sexual ethics, the complementarity of men and women, and theories of female empowerment and gender equality. She has also engaged in research on public policy issues concerning

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[1] This brief is filed with the consent of all parties. No counsel for a party in this Court authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund its preparation or submission.

[2] Institutional affiliations are listed for identification purposes only.

low-income fragile families, particularly focusing on women and children.

Dr. Melissa Moschella is an Assistant Professor of Philosophy at The Catholic University of America, and currently a Myser Fellow at the Notre Dame Center for Ethics and Culture. She is also a member of the Academic Council of the International Children's Rights Institute. She has published articles on the moral dimensions of bioethics, children's rights, parental rights, conscience rights and sexual ethics.

Dr. Susan E. Hanssen is an Associate Professor of History at the University of Dallas, where she teaches American Civilization and American Women's History. As the 2010–2011 Garwood Fellow at the James Madison Program in American Ideals and Institu tions at Princeton University she began a research project on Henry Adams and the Adams family women, and particularly his concern about the weakening of a culture of strong women and the destruction of the family in America.

Maggie Gallagher is a senior fellow with the American Principles Project and was the founder of the Institute for Marriage and Public Policy and co-founder of the National Organization for Marriage. She is the author of four books on marriage, including *The Case for Marriage; The Abolition of Marriage: How We Destroy Lasting Love*; and most recently *Debating Same-Sex Marriage*.

SUMMARY OF ARGUMENT

Throughout the history of civilization, marriage's universally defining feature has been the uniting of

man and woman. That timeless conception of marriage has been society's best means of connecting men to the women who bear their children and ensuring that they collectively remain a family. For centuries, that understanding of marriage has served to forestall the ills—especially to women, children, and underprivileged populations—that all too often result when society separates sex, procreation, and childrearing. It has provided stability where there might otherwise be disorder. Where it has flourished, marriage has greatly benefited society, as well as children and adults (both men and women) in married households, particularly those from underprivileged backgrounds.

Recently, however, some States have changed marriage's universally defining feature in their laws. No one knows for sure what the long-term effects of this fundamental change might be. But many reasonable people of good will are legitimately concerned about transforming marriage into an institution that denies the importance of gender diversity for family life, that further entrenches an adult-centered view of marriage, and that no longer affirms marriage's animating social purpose of connecting sex, procreation, and childrearing. They worry that such a transformation will impede marriage's ability to serve society as it has so well in the past.

Their concerns are well-founded. In particular, it is reasonable to project that the redefinition of marriage will have negative long-term consequences. And that is particularly true for women and their children in socioeconomically disadvantaged communities. That topic is the focus of this brief.

ARGUMENT

I. The Institution of Marriage Guides and Channels Human Behavior, and Especially Benefits Women in Disadvantaged Communities and their Children.

It is often said—and rightly so—that marriage is an institution. *See, e.g.*, *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). But in reciting that truism, many often overlook or fail to appreciate an institution's inherent role in guiding and channeling human behavior.

"In its formal sociological definition, an institution is a pattern of expected action of individuals or groups enforced by social sanctions, both positive and negative." Robert N. Bellah, *et al.*, THE GOOD SOCIETY 10 (1991). Stated differently, "[i]nstitutions are the humanly devised constraints that structure ... social interaction." Douglass C. North, *Institutions*, 5 J. OF ECON. PERSPECTIVES 97, 97 (Winter 1991). "Institutions ..., by the very fact of their existence, control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible." Peter Berger and Thomas Luckmann, THE SOCIAL CONSTRUCTION OF REALITY 52 (1966); *see also* A.R. Radcliffe-Browne, STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY 10-11 (1952) ("[A] person [in a social institution] knows that he is expected to behave according to these norms and that the other person should do the same").

Institutions influence people's choices and behavior through a set of social rules, norms, expectations, and understandings—formal and informal, legal and

cultural. *See* Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, *in* THE NEW INSTITUTIONALISM IN SOCIOLOGY 19 (Mary Brinton & Victor Nee eds., 1998). As its history makes clear, the institution of marriage developed for the primary social purpose of encouraging men and women to enter durable unions, remain sexually faithful to each other, and jointly raise the children that naturally result from their relationships. *See* W. Bradford Wilcox. *et al.*,, *Why Marriage Matters* 15 (Institute for American Values 2d ed. 2005) ("[M]arriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce"); James Q. Wilson, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES 41 (2002). At bottom, then, marriage, as a social institution, exists to connect children to both their mother and father and to connect fathers and mothers to each other. *See* Kingsley Davis, *Introduction: The Meaning and Significance of Marriage in Contemporary Society*, *in* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION 1, 7-8 (Kingsley Davis ed., 1985). Indeed, that is the reason why "governments got into the business of defining marriage, and remain in the business of defining marriage" still today. *DeBoer v. Snyder*, 772 F.3d 388, 404 (6th Cir. 2014).

Marriage accomplishes its purposes by, among other things, forging a social expectation that connects marriage, sex, procreation, and childrearing. *See Ex parte State ex rel. Alabama Policy Inst.*, No. 1140460, 2015 WL 892752, at *35-36 (Ala. Mar. 3,

2015) (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting)). In particular, marriage encourages men to commit to the women with whom they are in sexual relationships and the children born as a result of those relationships. *See id.* Marriage additionally maintains a complex web of interrelated norms that collectively affirm marriage's overriding purpose as providing for the welfare of children by connecting them to both their mother and father. *See generally* Brief of Amici Curiae Marriage Scholars.

When stable marriages thrive, women and those in socioeconomically disadvantaged communities (including children) benefit the most because "[m]arriage provides security, support and stability for women and the children they care for." Lynne Marie Kohm, *What's the Harm to Women and Children? A Prospective Analysis*, *in* WHAT'S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY 79, 83 (Lynn D. Wardle ed., 2008).[3] Indeed, married women generally have more wealth than their unmarried counterparts. *See* Audrey Light, *Gender Differences in the Marriage and Cohabitation Income Premium*, 41 DEMOGRAPHY 263, 263-84 (May 2004) (noting that women experience substantial financial gains from marriage). And social science research indicates that "marriage is effective

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[3] Men also benefit from marriage, but "the benefits to men of a long-standing committed marriage may be more remote, less tangible, and less immediate than for women." Amy L. Wax, *Diverging Family Structure and "Rational" Behavior: The Decline in Marriage as a Disorder of Choice*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF FAMILY LAW 15, 60 (Lloyd R. Cohen & Joshua D. Wright eds., 2011) (hereafter "Wax, *Diverging*").

in lifting many mothers and children out of poverty." Wax, *Diverging*, at 29 (citing at least ten sources).[4]

But when marriages either disappear or break down, women in underprivileged communities—and their children—suffer the most. For example, unmarried women are often left to raise their children as single mothers, but that life is usually quite difficult for women and their kids, particularly economically. *Id.* Moreover, while divorce can inflict adverse consequences, illness, and psychological distress on all the parties involved, the evidence indicates that the problems are particularly acute for women and children. S. Hope, B. Rodgers, and C. Power, *Marital Status Transitions and Psychological Distress: Longitudinal Evidence from a National Population Sample*, 29 PSYCHOLOGICAL MEDICINE 381 (Mar. 1999).

Decreasing incidence of marriage, increasing marital breakdown, and the harms that accompany both are widespread throughout disadvantaged communities. *See generally* Kathryn Edin & Maria Kefalas, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005); Sara McLanahan, *Diverging Destinies: How Children are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607 (2004). Indeed, a wealth of data shows that people

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[4] *See, e.g.*, Daniel T. Lichter. *et al.*, *Is Marriage a Panacea? Union Formation Among Economically Disadvantaged Unwed Mothers*, 50 SOCIAL PROBLEMS 60, 60 (Feb. 2003) ("The economic benefits of marriage are especially strong among women from disadvantaged families"); Camille S. Williams, *Women, Equality, and the Federal Marriage Amendment*, 20 BYU J. PUB. L. 487, 492 (2006) ("[M]arriage helps women, especially women with children, attain financial stability").

with lower levels of education are less likely to marry,[5] more likely to have children outside of marriage,[6] and more likely to divorce.[7]

A vibrant marriage culture thus plays a vital role in bringing about the well-being of women and children, particularly those in socioeconomically disadvantaged groups. Therefore, if the redefinition of marriage further undermines marriage's vital role in connecting sex, procreation, and childrearing or in linking men to both their children and their children's mothers, it is reasonable to anticipate that this social change will inflict harm on these groups above all others.

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[5] *See* Nicholas Bakalar, *Education, Faith, and a Likelihood to Wed*, New York Times Science Times, at D7 (Mar. 23, 2010) ("The higher the level of education, the more likely people [are] to wed."); Wax, *Diverging*, at 15-16 (collecting data).

[6] *See* W. Bradford Wilcox, *et al.*, *The Marginalization of Marriage in Middle America*, Brookings Institute at 2 (Aug. 10, 2011), available at http://brookings.edu/~/media/research/files/papers/2011/8/10%20strengthen%20marriage%20wilcox%20cherlin/0810_strengthen_marriage_wilcox_cherlin.pdf (noting that the non-marital birth rate is 6 percent among Americans with a college degree, compared to 44 percent among Americans with only a high-school diploma); Ron Haskins and Elizabeth Sawhill, CREATING AN OPPORTUNITY SOCIETY 208 (2009) (noting that The least educated women are "six times as likely as the most educated women to have a baby outside of marriage").

[7] Steven P. Martin, *Trends in Marital Dissolution by Women's Education in the United States*, 15 DEMOGRAPHIC RESEARCH 537, 537-60 (2006).

II. Past Well-Intentioned Changes to Marriage Law and Policy Have Harmed Women and Children in Disadvantaged Communities.

"Institutions always have a history, of which they are the products. It is impossible to understand an institution adequately without an understanding of the historical process in which it was produced." Berger & Luckmann, *supra*, at 72. As a result, prudence counsels those involved in the current debate over the definition of marriage to inquire about—and learn from—past legal changes that have affected the institution.

For example, no-fault-divorce laws are a prime example of past changes in marriage laws that had a substantial (and largely unanticipated) effect on how people think about and interact with the institution. More than forty years ago, legislatures throughout the Nation began adopting no-fault-divorce laws for laudable purposes, such as facilitating the end of dangerous or unhealthy marriages. *See* Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Law and Family Distress*, 121 Q. J. ECON. 267, 267 (2006).

At the time, the proponents of those laws assured their fellow citizens that this legal change would have no ill effects. *See* Barbara Dafoe Whitehead, THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY 81-90 (1996). But history has shown that those assurances were short-sighted and misguided. *See, e.g.*, Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 149-50 (2005) ("most children of divorce ...

generally ... experience greater emotional, financial, and other forms of distress than children in intact families, and over a longer period of time"); *see also* Allen M. Parkman, GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY 93-99 (2000).[8]

No-fault divorce transformed the public meaning of marriage from a life-long union to a union that lasts only so long as both spouses choose. This change signified that "marriage ... exists primarily for the fulfillment of the individual spouses," and that "[i]f it ceases to perform this function, no one is to blame and either spouse may terminate it at will." Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1547 (1998) (quoting Mary Ann Glendon, ABORTION AND DIVORCE IN WESTERN LAW 106, 108 (1987)). Before no-fault divorce, our Nation's laws reinforced that divorce should not be a ready option, although it may be necessary in some circumstances. After no-fault divorce, however, the law taught that divorce is always a ready option.

No-fault-divorce laws thus weakened the social expectation that parents should remain together and

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[8] "[E]ven those who sponsored and initiated the principle of no-fault divorce now understand the unintended consequences. Katherine Spaht helped bring no-fault divorce to Louisiana in the 1980s .... By the end of the 1990s, Ms. Spaht was a key advocate for covenant marriage in Louisiana, a form of marriage that gave each spouse what was tantamount to 'a right to marriage' that could not be taken away unilaterally." Marianne M. Jennings, *Unintended Consequences: The Flaws in "It Doesn't Affect Anyone But Us" Argument in Favor of Legalizing Same-Sex Marriage*, *in* WHAT'S THE HARM?, *supra*, at 69, 71.

jointly raise their children until they reach adulthood. People living with no-fault divorce came to understand that the expectation of staying together for the sake of children gives way if either spouse is unfulfilled in their relationship. *See* William J. Goode, WORLD CHANGES IN DIVORCE PATTERNS 144 (1993) (no-fault divorce laws "helped to create a set of social understandings as to how easy it is to become divorced if married life seems irksome").

As a result of this change in marriage's meaning, social conventions now more readily permit the interests of adults in seeking personal fulfillment to trump the needs of children. Thus, in the end, the shift from fault-based divorce to no-fault divorce reinforced the adult-centered view of marriage.

Not surprisingly, the end result of these shifts in cultural understanding led divorce rates to increase above their historical trends. *See* Douglas W. Allen and Maggie Gallagher, *Does Divorce Law Affect the Divorce Rate? A Review of Empirical Research, 1995-2006*, Institute for Marriage and Public Policy Research Brief 1 (Jul. 2007);[9] Parkman, GOOD INTENTIONS GONE AWRY, at 91-93 (summarizing available research); *see also United States v. Windsor*, 133 S. Ct. 2675, 2715 n.5 (2013) (Alito, J., dissenting) (discussing "the sharp rise in divorce rates following the advent of no-fault divorce"). This seemingly small legal change ushered in a culture where family "relationships are fragile and often unreliable." Wallerstein, THE UNEXPECTED LEGACY OF DIVORCE, at 297; *see also*

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[9] Available at http://www.marriagedebate.com/pdf/imapp.no-fault.divrate.pdf.

Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 HARV. J.L. & PUB. POL'Y 949, 975-76 (2006) (noting that no-fault-divorce laws created "a divorce culture" that "has lead to a society with ... less commitment").

That, in turn, has caused a significant increase in the risk of harm to everyone involved. Divorce tends to inflict physical and psychological distress on women, for example. *See* Hope, Rogers, and Power, *supra*. And divorced women typically face a host of financial hardships that married women generally do not. *See infra* at 31-32.[10] Furthermore, these difficulties have particularly ravaged women and their children in underprivileged communities, whose members rely most heavily on, and therefore suffer most from the loss of, the institutional benefits of marriage. *See supra* at 6-7 and n.6.

Changes in marriage laws can have effects far beyond the intended beneficiaries, as the experience with no-fault divorce laws illustrates. Such legal changes alter how society understands marriage, the expectations that people associate with marriage,

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[10] Divorce begins a prolonged process of residential and relational instability: families relocate; new romantic partners move in and out of the household; and many children lose contact with their fathers. *See* Andrew J. Cherlin, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 16-24 (2009). As a result, children whose parents divorce are at significantly great risk for a host of economic, behavioral, educational, social, and psychological problems. *See* Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE OF CHILDREN 75, 75 (Fall 2005).

and, ultimately, the behavior of people when they interact with marriage. And sometimes those legal transformations will bring about adverse consequences that significantly dwarf their good intentions.

III. Redefining Marriage To Encompass Same-Sex Relationships Will Likely Harm Women and Children, Particularly Those in Disadvantaged Communities.

A. Redefining Marriage Transforms Its Public Meaning.

Redefining marriage will transform its public meaning. And it will do so in at least three profound ways that are particularly relevant to women and children in underprivileged communities. *See, e.g.*, Joseph Raz, ETHICS IN THE PUBLIC DOMAIN 23 (1994).

First, it will remove the gender diversity that is an inherent part of the man-woman-marriage institution. It will establish that gender diversity is no longer an expected and valued part of family life—that neither the presence of a man nor the presence of a woman is considered important to family formation or the upbringing of children. *See* Brief of Amici Curiae Marriage Scholars, Part II.A.

Second, redefining marriage will eliminate society's longstanding preference for biological kinship. It will "dispense[] with the principle that the individuals who give life to children should be the ones who raise them in a bonded and enduring relation." Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, *in* THE MEANING OF MARRIAGE 29, 45 (Robert P. George &

Jean Bethke Elshtain eds., 2006). And it will prevent the government from affirming that the purpose of marriage is to connect a man and a woman to each other and to the children they beget.

Professor William Eskridge, a leading advocate of same-sex marriage, has candidly described how redefining marriage will bring about this "reconfiguration of family" that deemphasizes gender diversity and biological-kinship ties:

> [Redefining marriage] involves the reconfiguration of family, de-emphasizing blood, gender, and kinship ties .... In our legal culture the linchpin of family law has been the marriage between a man and a woman who have children through procreative sex. Gay experience with "families we choose" delinks family from gender, blood, and kinship. Gay families of choice are relatively ungendered, raise children that are biologically unrelated to one or both parents, and often form no more than a shadowy connection between the larger kinship groups.

Louis DeSerres, *Preserve Marriage—Protect Children's Rights (Canada)*, *in* WHAT'S THE HARM?, *supra*, at 103, 106 (quoting William N. Eskridge, Jr., GAYLAW: CHALLENGING APARTHEID IN THE CLOSET 11 (1999). "Delink[ing]" children from their multigenerational families, for which Eskridge appears to advocate, could be particularly harmful in disadvantaged communities, where there is a high incidence of grandparents raising grandchildren, because grandparents' willingness to maintain contact with grandchildren appears to be related to biological connec-

tions. *See* Megan Fulcher, *et al.*, *Contact with Grandparents among Children conceived via donor insemination by Lesbian and Heterosexual mothers*, 2 PARENTING: SCIENCE AND PRACTICE, 61, 64, 72 (2002).

Third, redefining marriage will further separate marriage, sex, procreation, and childrearing. Yet unlike those prior changes, "the legalization of same-sex marriage would not be just one more example of the" separation of these historically related goods, "but the ultimate culmination that finally shifts the institutional logic of marriage and ... marginalizes children from its basic meaning." Browning & Marquardt, *supra*, at 46-47. This is because only man-woman couples are capable of connecting marriage, sex, procreation, and childrearing seamlessly in the biological home; same-sex couples simply cannot. Thus, redefining marriage will, once and for all, obscure marriage's purpose of linking sex, procreation, and childrearing for the good of children. *See* Witherspoon Institute, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 18 (2008).

This change, in other words, will permanently ensconce an adult-centered view of marriage. It will include within marriage a class of couples that cannot, in and of their own relationship, create children—a class of couples that must involve someone from outside their relationship to bring a child into their home. This new definition will thus sever the inherent connection between marriage and children and, in doing so, emphasize that marriage is designed for the adults who enter into it, rather than the children created from it.

Even more troubling, because a same-sex couple must necessarily borrow the procreative powers of others for their own child-rearing purposes, there is a serious risk of objectification—that the borrowed man will be reduced to the role of sperm donor, and the borrowed woman reduced to the role of egg donor and/or uterus lessor. In such transactional procreation, neither the same-sex couple nor the child is likely to fully appreciate the excluded man or woman, nor is an ongoing relationship likely between the child and the donor, thereby depriving the child of any connection to his or her biological parent. *See, e.g.*, Camille Williams, *Planned Parent-Deprivation: Not In the Best Interests of the Child*, 4 WHITTIER J. CHILD & FAM. ADVOC. 375 (Spring 2005).

B. This New Understanding of Marriage Will Have Adverse Real-World Long-Term Effects.

Adverse effects on already disadvantaged women and their children have been overlooked by supporters of same-sex marriage, as the influence on human behavior that will results will have adverse consequences unevenly distributed throughout society, falling most heavily on poor women and their children. Indeed, present trends suggest that those consequences will fall with disproportionate weight on disadvantaged communities.

Moreover, the consequences of redefining marriage will occur over time. No serious scholar argues that if marriage is redefined to include same-sex couples, man-woman couples will run to the courthouse and dissolve their marriages tomorrow. Rather, the adverse effects will occur over time as more and more

people are socialized by, and live consistent with the implications of, this new understanding of marriage. When a massive ship fundamentally alters course, it takes time for its new path to manifest itself.

The projected consequences discussed below will likely begin to take root soon after marriage's redefinition, but will become more readily apparent after a generation grows up with this new understanding of marriage. Indeed, once one generation has been socialized in a world where the government does not—and cannot—promote the biological home as an ideal family arrangement; where men and women are viewed as interchangeable, nonessential facets of family life; and where the law has cemented marriage as a mere governmental capstone of a loving relationship, some people will inevitably make different choices concerning marriage and family formation. Those choices will tend to elevate the desires of adults in their quest for love and fulfillment above society's need for family stability. Inescapably, this change in people's behaviors will have grave consequences for society.

Nor will the redefinition of marriage affect all segments of society equally. *See* Wax, *Diverging*, at 60 ("[T]he success of social mores in shaping behavior will vary depending on circumstances ... and group culture"). The institution of marriage provides a template for people to follow in structuring their family lives. *Id.* It thereby "reduc[es] the need for individuals to perform the complicated calculations necessary to chart their own course." *Id.* Thus, the communities that rely heavily on a social institution's easy-to-follow guidelines to direct their decision-making processes, such as the socioeconomically disadvantaged,

will be most significantly harmed by the erosion of marriage's template for family life.

This community must deal with a multiplicity of factors and obstacles in the course of their day-to-day lives that individuals with higher incomes and levels of education generally do not face. Very real and immediate questions of how to make ends meet and how to deal with emotional turbulence, threats to personal security, and other impacts of higher rates of crime and social disturbance in their communities demand their time and attention on a daily basis. *See* Garance Franke-Ruta, *Remapping the Culture Debate*, AMERICAN PROSPECT (Feb. 2006) ("Lower-income individuals simply live in a much more disrupted society, with ... more interpersonal and interfamily strife, than do the middle- and upper-middle class people they want to be like"). These and other factors tend to drive the socioeconomically disadvantaged to "local"—that is, short-term—modes of decision-making that do not fully consider the long-term consequences of many of their relationship choices. *See* Wax, *Diverging*, at 71.

But this sort of short-term decision-making in the relationship context often "generates a pattern of infidelity, short-lived liaisons, and fragile partnerships." Wax, *Diverging*, at 57. "The expected results" of that type of behavior "include lower marriage rates, a rise in short-term cohabitation, more multiple partner fertility, higher numbers of extra-marital births, and children growing up in fatherless families." *Id.* Thus, communities that engage in short-term modes of decision-making benefit greatly from marriage's historic model because that model encourages a men and women to marry, remain sexually faithful to each other, and jointly raise the children they beget. *See*

id., at 60-61. But because redefining marriage away from its biological roots would further blur—and, in some ways, finally destroy—that historic understanding of marriage, the poor and marginalized will be among the most adversely affected by this fundamental social change.

Notably, history has shown that the socioeconomically disadvantaged are the most vulnerable to changing social understandings of marriage. *See supra* at 5-6, 10-11. As discussed above, past legal changes that have already undermined the historic understanding of marriage have harmed the poor and least-educated the most. Thus, it stands to reason that this further change, which is more far-reaching than any alteration that preceded it, would inflict its harm on the socioeconomically disadvantaged above all others.

Not only will the undermining of marriage's historic norms harm the poor and disadvantaged, but the new norms that will accompany a redefined marital institution will further exacerbate those harms. "As the incidence of non-marriage and single parent families within more vulnerable groups increases, group dynamics, such as tipping and contagion, may ... increas[e] the frequency of self-defeating behaviors." Wax, *Diverging*, at 65. "As these patterns become more dominant, they will in turn be considered more acceptable," thus creating "a new set of norms" that "may further entrench these behaviors, making them more difficult to reverse." *Id.*

Other segments of the community are not likely to experience the anticipated harms to the same degree as the poor and marginalized. For example,

"[m]ore educated and advantaged individuals are by and large better equipped to do for themselves" the tasks performed by "strong institutional and normative expectations." Wax, *Diverging*, at 62. Their higher propensity to engage in long-term modes of decision-making enables them to perceive the inherent value of embracing marriage's traditional norms and positions them to better navigate the erosion of our historic understanding of marriage. *Id.* Thus, the legal profession, as a class of well-to-do and well-educated social elites, would be remiss if it were to view the consequences of redefining marriage only from its own rather unique perspective.

C. Redefining Marriage Risks Several Specific Anticipated Harms to Women and Children in Disadvantaged Communities.

1. More Women Will Be Left to Raise their Children as Single Mothers.

The Pool of Heterosexual Men Interested in Marriage and Fatherhood Will Decrease. Redefining marriage will treat gender as unimportant to family life. *See supra* at 13. As heterosexual men from disadvantaged communities come to believe that they are not necessary to their partner's or their children's well-being, they will be less likely to marry or actively engage as fathers.

It has been long recognized that "the culture of fatherhood and the conduct of fathers change from decade to decade as social and political conditions change." William J. Doherty, *et al.*, *Responsible Fathering*, 60 J. MARRIAGE & FAM. 277, 278 (1998). This

inconstant history of fatherhood has led many scholars to conclude that fathering is "more sensitive than mothering to contextual forces." *Id.* Indeed, research shows that men "are more reliant on ... social and relationship supports to foster their healthy involvement in family life and parenting." Jason S. Carroll & David C. Dollahite, *"Who's My Daddy?" How the Legalization of Same-Sex Partnerships Would Further the Rise of Ambiguous Fatherhood in America*, *in* WHAT'S THE HARM?, *supra*, at 47, 62.

Troublingly, though, the redefinition of marriage will transform marriage—society's core family structure—to make men's involvement ancillary and optional. Therefore, this will likely alienate men from marriage and family life, causing "an increase in men who live outside marriage and parenthood altogether." Carroll & Dollahite, *supra*, at 63.

More Single Mothers. As the pool of heterosexual men interested in marriage and fatherhood decreases, fewer women will marry.[11] Nevertheless, these women will continue to have children, and as a result,

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[11] *See* Steven L. Nock, *The Consequences of Premarital Fatherhood*, 63 AM. SOC. REV. 250, 251 (1998) (hereafter "Nock, *Consequences*") ("[W]hen social or environmental factors alter this equilibrium [between suitable male and female partners] ... marriages will be ... foregone."); Wax, *Diverging*, at 25 (noting that a decline in marriageable men "will drive down marriage rates").

more kids will be born out of wedlock[12] and raised by single mothers.[13]

Regrettably, however, the increase in single-mother homes will negatively affect both women and their children. Poverty is substantially higher among single mothers than married mothers. *See* Adam Thomas & Isabel Sawhill, *For Love and Money? The Impact of Family Structure on Family Income*, 15 THE FUTURE OF CHILDREN 57, 57 (Fall 2005) ("[S]ingle-parent households ... have less family income and are more likely to be poor than ... married-parent families"); Lichter, *supra*, at 60. This is so, at least in part, because "[b]ecoming a single parent ... seriously interferes with work and education, and saddles a woman with onerous responsibilities that are difficult to bear alone." Wax, *Diverging*, at 57.

Children raised by single mothers also tend to suffer. The absence of economic resources is among the most important factors contributing to "children's lower achievement in single-parent homes." Sara McLanahan & Gary Sandefur, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 3 (1994). Another significant factor is the absence of fathers, *id.*, because "[t]he weight of scientific evidence seems

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[12] Jennings, *supra*, at 75 (noting that after The Netherlands redefined marriage, "out-of-wedlock births ... crept up 8%, ... the highest rate of increase since 1970).

[13] *See* Doherty, *Responsible Fathering*, at 280 ("In nearly all cases, children born outside of marriage reside with their mothers" and experience "marginal" father presence); Nock, *Consequences*, at 251 (noting that a lack of marriageable men "contributes to ... the formation of female-headed families").

clearly to support the view that fathers matter" for children's development, Wilson, *supra*, at 169.[14]

Because they lack adequate resources and their father's daily involvement, those children, when compared to kids "of similar background who grow up with both parents at home," are more likely to drop out of high school or become teenage parents. *See* McLanahan & Sandefur, *supra*, at 2. They are also likely to turn to a life of violence. *See* Jennings, *supra*, at 71 ("[B]eing born to an unmarried mother is by far the most significant factor disposing children to a life of crime—more significant than IQ, race, culture, or education"). These sorts of negative child outcomes not only place additional stress and strain on mothers, they also demonstrate how single-mother homes often perpetuate poverty from one generation to the next.[15]

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[14] *See e.g.*, Jane Mendle, *et al.*, *Associations Between Father Absence and Age of First Sexual Intercourse*, 80 CHILD DEV. 1463, 1463 (2009); Eirini Flouri & Ann Buchanan, *The Role of Father Involvement in Children's Later Mental Health*, 26 J. ADOLESCENCE 63, 63 (2003); *see also* Barack Obama, *Obama's Speech on Fatherhood* (June 15, 2008), http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html; David Popenoe, LIFE WITHOUT FATHER (1996).

[15] *See* Robert I. Lerman & W. Bradford Wilcox, *For Richer, For Poorer: How Family Structures Economic Success in America* 3 (Institute for Family Studies 2014) ("Growing up with both parents (in an intact family) is strongly associated with more education, work, and income among today's young men *and* women. Young men and women from intact families enjoy an annual 'intact-family premium' that amounts to $6,500 and $4,700, respectively, over the incomes of their peers from single-parent families.").

More Irresponsible, Unmarried Men Create Additional Hardships for Women and Children. For many men, particularly those from disadvantaged communities, marriage and active fatherhood play a vital role in their maturation—shifting their behaviors from antisocial and selfish to productive and others-oriented. *See* Steven L. Nock, MARRIAGE IN MEN'S LIVES 6-8 (1998); George A. Akerlof, *Men without Children*, 108 THE ECONOMIC JOURNAL 287, 290 (1998) ("[M]en settle down when they get married: if they fail to get married they fail to settle down"); Steven Rhoads, TAKING SEX DIFFERENCES SERIOUSLY 252-53 (1994). "Studies indicate that when men avoid marriage ..., they continue with some of the antisocial and destructive behaviors that are more common among single men." Kohm, *supra*, at 84 (citing Akerlof, *supra*, at 287).[16] The prevalence of this socially disruptive conduct among some men hurts women and children, who are often the targets of their destructive conduct. Thus, one of the many ways in which marriage benefits women is that "marriage makes men better." Williams, *Women*, *supra*, at 490.

These problems will compound as the absence of marriage perpetuates itself. Women are understandably uninterested in marrying prospective mates with significant behavior shortcomings such as drug abuse and a lack of employment. *See* Wax, *Diverging*, at 57 ("These women's ... failure to marry, despite a pro-

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[16] *See also* Williams, *Women*, *supra*, at 490 (noting that some groups of unmarried young men can be "prone to engage in violence and predatory sex" and that, "[c]ompared with the married, young unmarried men tend to be lazy and unfocused").

fessed desire to do so, is a function of ... [the] bad character and anti-social conduct" of such men). Therefore, the longer that these men live outside marriage, and the more that they persist in their socially disruptive behavior, the less likely that women will ever view them as suitable marriage partners.

Unwed men can also jeopardize the welfare of women and their children in other ways, both direct and subtle. For instance, unmarried men who father children typically have much less contact with their children than do married men, depriving those children of a strong father-child bond. Unmarried men also tend to make less money than their married counterparts.[17] This diminished income inflicts additional hardships on the children that these men beget—and, by extension, the mothers of those children—because fewer resources are available to support the children's upbringing.

2. More Man-Woman Couples Will Cohabit Rather Than Marrying, Thereby Further Harming Women and Children in Underprivileged Populations.

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[17] *See* Lerman & Wilcox, *supra*, at 3 ("[M]en enjoy a marriage premium of at least $15,900 per year in their individual income compared to their single peers"); Alexandra Killewald, *A Reconsideration of the Fatherhood Premium: Marriage, Coresidence, Biology, and Fathers' Wages*, 78 AM. SOC. REV. 96, 113 (2012) ("Together, these three ties [marriage, co-residence, and biology] linking fathers to their children and their children's mother lead to higher wages for fathers than for non-fathers, but absent any one tie the fatherhood premium disappears."); Nock, *Consequences*, at 250.

As discussed above, redefining marriage will obscure the institution's purpose of connecting sex, procreation, and childrearing in the biological family. *See supra* at 15. As this occurs, the social expectation and pressure to marry for man-woman couples having or raising children will likely decrease further, particularly in socioeconomically disadvantaged communities. *See* Robert P. George, *et al.*, WHAT IS MARRIAGE? 62 (2012) (noting that it might be "more socially acceptable ... for unmarried parents to put off firmer public commitment"). These developments, over time, will lodge in the public consciousness the idea that marriage is merely an option (rather than a social expectation) for man-woman couples raising children.

That, in turn, would likely result in fewer man-woman couples marrying, specifically in lower-income communities where the immediate (though not the long-term) effect of marriage would be financially disadvantageous. *See* Julien O. Teitler, *et al.*, *Effects of Welfare Participation on Marriage*, 71 J. MARRIAGE & FAM. 878, 878 (2009) (concluding that "the negative association between welfare participation and subsequent marriage reflects temporary economic disincentives"). Thus, it is reasonable to expect that more man-woman couples having or raising children will choose cohabitation over marriage.[18]

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[18] Merely delaying the decision whether to marry until after they begin having children does not bode well for the prospects of cohabiting couples eventually choosing marriage. For once those couples have children outside of wedlock, they are less likely to marry and more likely to cohabit. *See Nock, Consequences*, at 250.

But cohabitation is associated with many negative outcomes for women and their children. "Cohabitors," for example, "report higher levels of depression than their married counterparts, net of sociodemographic factors." Susan L. Brown, *The Effect of Union Type on Psychological Well-being: Depression Among Cohabitors Versus Marrieds*, 41 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR 241, 241 (2000). "The greater depression characterizing cohabitors is primarily due to their higher relationship instability relative to marrieds." *Id.* Thus, as more man-woman couples choose cohabitation over marriage, the women in those relationships will be more likely to experience depression and angst.

Women in cohabiting relationships, moreover, are more likely to experience violence at the hands of their partners when compared to women in marital relationships. *See* Amanda Berger, *et al.*, *Relationship Violence Among Young Adult Couples*, Child Trends Research Brief 1 (June 2012) ("[C]ohabiting couples reported the highest levels of relationship violence"); Catherine Kenney & Sara McLanahan, *Why Are Cohabiting Relationships More Violent Than Marriages*, 43 DEMOGRAPHY 127, 127 (Feb. 2006) (discussing "the higher rate of intimate-partner violence and intimate-partner homicide among cohabiting couples than among marriage couples"). Thus, a projected decline in marriage portends significant risks to women's safety, especially in underprivileged socio-economic groups.

Additionally, "[c]ohabiting families" are "considerably worse off" economically "than married-parent families," Thomas & Sawhill, *supra*, at 57, because

"cohabiting unions are marked by fewer long-term investments and plans, produce less specialization and pooling of resources, [and] are associated with a smaller wage premium for men," Wax, *Diverging*, at 30. Consequently, the women and children in these relationships will endure additional hardships brought upon by a deficiency of economic resources.[19]

Without the stability that marriage provides, more cohabiting man-woman couples will end their relationships because "unmarried cohabitations overall are less stable than marriages." Kohm, *supra*, at 86.[20] When a cohabiting relationship ends, women are usually left in a worse position financially than they would have been had they been married, because they do not have the financial protections and benefits available through divorce. In fact, after dissolving a cohabiting relationship, the woman's financial status often declines "precipitously, leaving a substantial proportion of women in poverty." Sarah Avellar & Pamela Smock, *The Economic Consequences of the*

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[19] The absence of marriage has such a direct effect on household resources that some scholars have projected that "poverty rates would drop substantially if [mothers living with unattached men] were to marry." Thomas & Sawhill, *supra*, at 57.

[20] *See also* Wax, *Diverging*, at 30 ("In general, cohabitation does not signify the same degree of commitment as does marriage, and is in fact usually less durable" (internal quotation marks omitted)); Larry Bumpass and Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUDIES 29 (2000) (demonstrating that cohabiting families are less stable than married families).

Dissolution of Cohabiting Unions, 67 J. MARRIAGE & FAM. 315, 315 (2005).[21]

3. More Man-Woman Couples Will End Their Relationships, Leaving Low-Income Women and Their Children in the Lurch.

Redefining marriage will also entrench an understanding of marriage that elevates adult fulfillment over children's needs, and that denies the benefits to children from being raised by their biological parents or from having both a mother and a father. *See supra* at 15. This newfound meaning of marriage will result in fewer man-woman couples, specifically those in disadvantaged communities, who together persevere through marital difficulties for the well-being of their families. After all, if society understands marriage to exist predominantly for adult happiness, then the idea of sticking through hard times for the good of others, be it children or a spouse, will decline further.

This projection of increased marital instability is supported not only by logic, but also by social science. Empirical evidence shows that spouses who embrace the adult-centered view and its corresponding ethic are, on average, less satisfied with their marriages

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[21] Social science indicates that this pattern of cohabitation is self-replicating because children raised by cohabiting parents decide to engage in cohabiting relationships of their own more often than children raised in intact marital families. Paige D. Martin, *et al.*, *Adolescent Premarital Sexual Activity, Cohabitation, and Attitudes Toward Marriage*, 36 ADOLESCENCE 601. 601 (2001), *quoted in* Lynn Marie Kohm and Karen M. Groen, *Cohabitation and the Future of Marriage*, 17 REGENT U. LAW REV. 261, 263 (2005).

and thus more likely to experience conflict and divorce. *See* W. Bradford Wilcox and Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate versus institutional models of marriage*, 39 SOC. SCI. RESEARCH 687, 687 (2010); Wilcox, WHY MARRIAGE at 16 ("[I]ndividuals who embrace a conditional ethic to marriage—an ethic based on the idea that marriages ought to continue only as long as both spouses are happy—are less happy in their marriages"). Moreover, studies have shown a contagion effect associated with divorce, meaning that once people within a discrete community begin to end their marriages, friends and neighbors are more likely to follow suit. *See* Rose McDermott, *et al.*, *Breaking Up Is Hard to Do, Unless Everyone Else Is Doing It Too: Social Network Effects on Divorce in a Longitudinal Sample*, 92 SOCIAL FORCES 491, 515 (2009).[22]

Greater incidence of divorce poses significant risks for women, especially in poorer communities. Several studies have found that women's health often "deteriorate[s] ... following marital disruption." Bridget Lavelle & Pamela J. Smock, *Divorce and Women's Risk of Health Insurance Loss*, 53 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR 413, 413 (2012) (collecting studies). In the years immediately after their divorce, divorced women experience significantly higher levels of psychological distress than married women. Frederick Lorenz, *et al.*, *The Short-Term and*

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[22] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490708. The greater incidence of cohabitation among man-woman couples discussed above will further contribute to greater relationship instability because cohabiting relationships dissolve at a higher rate than marital relationships. *See supra* at 28 and n. 20.

Decade-Long Effects of Divorce on Women's Midlife Health, 47 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR 111, 111 (June 2006); *see also* Megan Sweeney & Allan Horwitz, *Infidelity, Initiation, and the Emotional Climate of Divorce: Are There Implications for Mental Health?*, 42 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR 295, 295 (2001) (noting that the "initiation [of divorce] is associated with increased depression in the absence of spousal infidelity"). And as the years pass, divorced women tend to experience "significantly higher levels of illness, even after controlling for age, remarriage, education, income, and prior health." Lorenz, *supra*, at 111. Thus, as divorce becomes more commonplace, it is reasonable to expect that more women will endure illness and psychological distress.

Divorce is also difficult for children. Indeed, studies have shown that "children with divorced parents ... have lower average levels of cognitive, social, and emotional well-being." Amato, *supra, at* 77. And these deficiencies "persist well into adulthood," *id.*, such that "parental divorce during childhood is linked with a wide range of problems in adulthood," *id.* at 78. These enduring development deficiencies experienced by the children of divorce will, in turn, compound the stressors in the lives of their mothers.

Divorced women are often left in economically compromised positions. *See* Pamela Smock, *et al.*, *The Effect of Marriage and Divorce on Women's Economic Well-Being*, 64 AM. SOC. REV. 794, 794-95 (1999) ("[W]omen's economic vulnerability outside of marriage is ubiquitous."). They typically become single mothers, *see* Carroll & Dollahite, *supra*, at 56; and as discussed above, single mothers experience a disproportionate share of poverty. *See supra* at 22.

Divorced mothers, in particular, often make less money than other females in the workforce. They "typically invest[ed] in the[ir] family by restricting their own work force participation, if only long enough to take care of small children." Kohm, *supra*, at 83 (quoting Thomas Sowell, *Gays Are Not "Entitled" to Marriage*, The Virginian-Pilot, at B9 (Aug. 21, 2006)). As a result, those women generally "experience decreased financial worth and marketability" because they "prioritiz[ed] child care and other domestic responsibilities." Kohm, *supra*, at 83; *see also* Williams, *Women*, *supra*, at 493 n.28 ("[B]ecause the prime time for career advancement corresponds to the best time for childbearing, mothers tend to lose promotions and raises they would have earned had they stayed full-time in the marketplace").

This explains, at least in part, why poverty rates for women who marry and later divorce exceed those of never-married women. Lichter, *supra*, at 60. And it also explains why, from a financial perspective, "divorce tends to have a disparate impact on the sexes, with women who have left the workforce in order to bear and raise children experiencing post-divorce free-fall economic losses." Williams, *Women*, *supra*, at 492-93.

The plight of divorced mothers is compounded by the tendency of their children's fathers to withdraw from the children's lives. "[R]esearch strongly indicates that substantial barriers exist for men's fathering outside of a caring, committed, collaborative marriage." Doherty, *Responsible Fathering*, at 290. And "[a] growing body of research has shown that if fathers do not live with the mother and child, their presence in the child's life is frequently marginal and,

even when active for a while, tends to be fragile over time." Carroll & Dollahite, *supra*, at 56; *see also* McLanahan & Sandefur, *supra*, at 3 ("When a father lives in a separate household, he is usually less committed to his child and less trusting of the child's mother. Hence he is less willing to invest time and money in the child's welfare."). Thus, because of the absence of marriage and of a joint residence with their children, divorced fathers are typically less engaged with their kids. This, in turn, places additional burdens on divorced mothers.

4. Increased Demand for Commercial Surrogates Will Harm Women, Particularly Those in Disadvantaged Communities.

As previously discussed, redefining marriage will convey that gender diversity is not an inherent or valuable part of family life or of childrearing. *See supra* at 13. While some same-sex couples interested in raising children will simply adopt, "legalized same-sex marriage will likely spur demands for greater legal and social support for same-sex couples to have access to reproductive technologies, since only by using these technologies can they have their 'own' children." Browning & Marquardt, *supra*, at 32. Indeed, fertility doctors have already noticed a surge in demand whenever a jurisdiction legalizes same-sex marriage. Michael Cook, *The Link Between Rented Wombs and Gay Marriage*, Mercatornet (July 19, 2012).[23]

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[23] Available at http://www.mercatornet.com/articles/view/the_link_between_rented_wombs_and_gay_marriage.

Although the practice is relatively new, significant problems are already beginning to emerge from what amounts to a market for the sale of babies. Cheryl Miller, *Babies for Sale*, The New Atlantis (Summer 2006).[24] Because surrogacy and sperm or egg donation is increasingly looking like a commercial market in which inputs are purchased as raw materials and the "product"—a child—is sold at a profit, the "buyers" of the product are increasingly acting like consumers of other commodities, experiencing "buyers remorse" and seeking "refunds" for children born with genetic diseases, for example, Alana Newman, Testimony in Opposition to AB460, California Assembly Committee on Health (April, 30 2013),[25] or even filing suit for "wrongful birth" against a sperm bank that mistakenly supplied sperm from a donor of the "wrong" race, Complaint for Wrongful Birth and Breach of Warranty, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2014-L-010159 (Ill. Cir. Ct., Cook County, filed Sept. 29, 2014).

Not surprisingly, the children who have been bought and sold in such a process are demonstrating unusually high levels of psychological angst from "genealogical bewilderment" and a sense of abandonment from the anonymous biological parent. *See, e.g.*, H.J. Sants, *Genealogical bewilderment in children with substitute parents*, 37 BRIT. J. MED. PSYCHOL. 133, 133 (1964); Alana S. Newman, *Children's Rights, or Rights to Children?*, Public Discourse (November

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[24] Available at http://www.thenewatlantis.com/publications/babies-for-sale.

[25] Available at http://ccgaction.org/uploaded_files/Testimony%20of%20Alana%20S.%20Newman.pdf.

10, 2014) ("It's shameful to say, but my father was paid roughly $75 to promise to have nothing to do with me").[26] As one study reports, "on average, young adults conceived through sperm donation are hurting more, are more confused, and feel more isolated from their families" than those raised in two-parent, biological families. Elizabeth Marguardt, *et al.*, *My Daddy's Name is Donor* at 5, Institute for American Values (2010).[27]

The problems inherent in surrogacy (as opposed to sperm donation) are even more pronounced. Surrogate mothers face serious physical risks, for example, such as "high risks of complication and multiple births" associated with in vitro fertilization. Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 420 (2012). They may also suffer psychological problems, such as emotional trauma from being denied the ability to emotionally bond with the baby they carried to term and delivered. Paula Amato, *et al.*, Ethics Committee of the American Society for Reproductive Medicine, *Consideration of the Gestational Carrier: a committee opinion*, 99 FERTILITY AND STERILITY 1838, 1841 (June 2013).

The practice itself tends to exploit and harm women. *See* Williams, *Women*, *supra*, at 509-10 ("[T]ransactional procreation exploits, demeans, and

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[26] Available at http://www.thepublicdiscourse.com/2014/11/13993/.

[27] Available at http://americanvalues.org/catalog/pdfs/Donor_FINAL.pdf.

devalues women" (footnote omitted)). This exploitation will most widely occur among women in underprivileged communities because they are more likely to accept the harms of commercial surrogacy in order to provide for their daily needs. Indeed, as one scholar presciently noted two decades ago, "the expansion of the surrogacy industry threatens to 'create a national traffic in women exploited for their reproductive faculties and functions ... where women are procured as instruments in a system of breeding." Mary Lyndon Shanley, *Surrogate Mothering and Women's Freedom: A Critique of Contracts for Human Reproduction*, in EXPECTING TROUBLE: SURROGACY, FETAL ABUSE, AND NEW REPRODUCTIVE TECHNOLOGIES 156 (1995). And increasingly, poor women in third-world countries are being exploited by a thriving transnational surrogacy tourism industry, their wombs hired out—often under compulsion—with little regard for their own health. Erica Davis, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 MINN. J. INT'L L. 120, 124 (2012); Hedva Eyal, *Genewatch: Reproductive Trafficking*, Council for Responsible Genetics.[28]

Same-sex couples are not the only ones availing themselves of such assisted reproductive technologies, of course, but because same-sex couples must necessarily involve someone outside the relationship, either directly or through the use of such technologies if they want children who are genetically connected to one of them, we are already seeing a "rising demand for surrogate mothers," with all the attendant risks

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[28] Available at http://www.councilforresponsiblegenetics.org/genewatch/ GeneWatchPage.aspx?pageId=313.

described above. Helen M. Alvaré, *Same Sex Marriage and the "Reconceiving" of Children*, 64 Case Western L. Rev. 829, 857 (2014). This truly is a brave new world that will be just one of the collateral consequences of the redefinition of marriage that this Court is being asked to impose on the country.

CONCLUSION

Redefining marriage as a constitutional mandate will force States to recognize a relatively small class of additional relationships as marriages. But in the process, it will likely harm countless women and children, particularly those in low-income communities. The risks that attend this fundamental social change are thus great. Therefore, if that change is going to happen, if society is going to embark on a course that threatens so much harm to women and children in socioeconomically disadvantaged communities, it should be the result of the thorough debate and vetting that occurs through the democratic process. That way, should the harms that this brief anticipates occur, the States will have only themselves to blame, and they will have a means to take corrective action.

But if this Court constitutionally redefines marriage nationwide, and if the harms discussed herein come to pass, the States would be unable to protect women, their children, and the underprivileged by restoring the man-woman marriage institution. Amici thus urge this Court to keep this important issue where it belongs: in the hands of the States and their citizens.

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